October 31, 2002

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation in CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147

Dear Ms. Dortch:

On behalf of the Competitive Telecommunications Association ("CompTel") and the Promoting Active Competition Everywhere ("PACE") Coalition, we write to respond to recent *ex parte* submissions by the Regional Bell Operating Companies ("RBOCs")[1] in the aforementioned dockets that urge the Federal Communications Commission to eliminate local switching as an unbundled network element. This "tough love" approach to local competition will not result in the transition of customers served by the Unbundled Network Element Platform ("UNE-P") to competitor-provisioned facilities. Instead, most of the millions of UNE-P customers will be forced back onto the networks of the incumbent local exchange carriers ("ILECs").[2] These proposals completely ignore the substantial impairments confronting new entrants that only access to unbundled local switching addresses.

It is important to appreciate that even when a competitor owns a switch or obtains switching from a third-party, the competitor faces significant impairment in terms of cost, reliability, time and scale when accessing the ILECs' loop facilities commonly referred to as the "hot cut" problem. This problem is particularly acute for entrants that seek to serve mass-market residential and small business customers. Simply stated, many competitive carriers utilize UNE-P because they cannot gain access to loops, not solely

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1 *See SBC Telecommunications, Inc., Memorandum of Ex Parte Presentation*, CC Docket Nos. 01-338, 96-98, and 98-147 (filed Oct. 11, 2002); *See BellSouth Ex Parte Notification*, CC Docket Nos. 01-338 at p. 19 (filed Oct. 7, 2002) *See Verizon Ex Parte Notification*, CC Docket Nos. 01-338, 96-98, and 98-147, at p. 16 (filed Oct. 16, 2002).

2 *See Reply Comments of the Competitive Telecommunications Association*, Declaration of Peter O. Claudy, CC Docket Nos. 01-338, 96-98, and 98-147 at p. 11 (filed July 17, 2002) ("…elimination of existing UNEs, for which any class of carrier is dependent—even if done on a finite and geographically-limited basis—will jeopardize those carriers, and may have unintended negative consequences for other carriers.")

based on impairment to the deployment of a switch. In fact, the significant barriers imposed by the ILECs' deficient loop provisioning processes is a long-standing, well documented problem that affects most competitive carriers, regardless of whether they use their own switch or obtain unbundled local switching from the incumbent.[3] The fact that competitive local exchange ("CLECs") and their customers have to endure these deficient, manual processes – while the ILEC can largely employ automated provisioning to serve the same mass-market customers – constitutes a classic barrier to entry. Therefore, unless the Commission first implements strict policies to remedy the threshold obstacle of loop access, competitive carriers will continue to be materially impaired in their ability to connect customers to existing or newly deployed switches. In turn, retail customers, particularly residential and small business customers, will lose all of the consumer welfare benefits envisioned by the Telecommunications Act of 1996 ("the Act") including lower prices, improved service quality and innovative service offerings because loop impairment will prevent competitive carriers from serving them.

CompTel and the PACE Coalition propose the following approach for ameliorating the impairment caused by the ILECs' costly, unreliable, slow and non-scalable loop provisioning processes. This is the first step toward enabling competitors to use their own switches to serve retail telecommunications customers. However, we emphasize that this is only the first step; there are many reasons why a CLEC is impaired without access to unbundled local switching from the ILEC, such as the inability to achieve viable scale for transport facilities, or failing to achieve sufficient density to justify such investment. This letter only addresses the issue of the impairment caused by the ILECs' deficient loop provisioning.

Competitors Are Impaired Without Loop Equal Access, Whether or Not They Own a Switch.

The presence of competitor-owned switches in a market provides no evidence that competitors are not impaired without access to the incumbents' unbundled local switching. Simply stated, a switch is of no use to a competitor unless the competitor can connect its customers' loops to the switch.

Whether a competitor uses its own switch or leases switching from a third-party, a customer's loop must be disconnected from the incumbent's facilities and reconnected to the competitor's facilities. The steps of this hand-crafting i.e., reconfiguring the customer's loop, backhauling its traffic, reconnecting the loop to the entrant's switch,

[3] More than one year ago, the Association for Local Telecommunications Services ("ALTS") filed a Petition asking the Commission to remedy the problem of loop impairment by adopting performance measures for ILEC loop provisioning and clarifying the Commission's rules concerning loop availability, among other things. The Commission has not acted on ALTS' Petition to date. *See Association for Local Telecommunications Services Petition for Declaratory Ruling: Broadband Loop Provisioning,* CC Docket Nos. 98-147, 96-98, 98-147 (filed May 17, 2001). ("ALTS Petition")

while coordinating the various steps needed to transfer the number to the new provider's equipment are collectively referred to as a "hot c ut." The hot cut process, which is a manual process, materially impairs a competitor's access to loop facilities. Moreover, ILECs do not face this impairment when they provide mass-market local services to their customers, and ILECs do not face a similar impairment when they provide long-distance service to consumers. The loop impairment CLECs face is well documented[4] and can be summarized as follows:

> Price: Hot cuts generally cost between $35 and $200 because they are manual rather than automated provisioning. Competitive carriers cannot recover this charge, which the incumbents are not forced to incur, from their end users. In contrast, a UNE-P migration is fully automated and costs have been generally found to range from $.35 to no more than $2 in most states.
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> Reliability: A hot cut always causes a customer to lose dial-tone, so it is an inherently risky procedure from the customer's perspective. Also, because it is a manual process, a hot cut introduces material unreliability into loop provisioning, including customer outages, service transfer delays, and other provisioning errors. Even what may seem to be "reasonable" performance results in an unacceptable level of customer service.[5] The customer frequently blames the error on the competitor, regardless of fault. This damages the competitor's reputation and often results in the loss of the customer.
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> Time: The manual nature of the hot cut process, which requires coordination between CLEC and ILEC technicians in a central office, takes more time than an automated provisioning process. To wit, in many states, the provisioning interval for UNE-P is 1 to 3 days whereas the corresponding interval for an unbundled loop is 5 to 6 days. In reality, the incumbents' poor loop provisioning performance can delay customer migration for more than 30 days.[6] This delay is unacceptable to the majority of retail customers, who are used to quickly switching long distance carriers.
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> Scalability: The hot cut process requires a technician to physically move a customer's loop from the incumbent's facilities to the competitor's facilities. This significantly limits the number of loops that the incumbent can provision. As commercial volumes increase, the incumbent will be required to hire additional

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4 *See, for example, Remi Retail Communications Written Ex Parte,* CC Docket Nos. 98-147, 96-98, and 98-147 (filed October 9, 2002); *Comments of Z-Tel Communications, Inc.*, CC Docket Nos. 98-147, 96-98, and 98-147, Rubino Affidavit and Attachments (describing capacity constraints and hot-cut processes of Verizon and BellSouth); ALTS Petition.

5 Suppose, for example, that at the Commission's behest, an estimated 10 million UNE-P lines were magically "migrated" to UNE-L over hot-cuts, and those hot cuts were performed with 95 percent accuracy. *500,000 consumer access lines* would go out of service at 95 percent accuracy.

6 *Remi Retail Communications Written Ex Parte,* CC Docket Nos. 98-147, 96-98, 98-147 (October 9, 2002).

technicians to meet demand, though this is possible only to a certain point: a central office can only accommodate a finite number of technicians. Moreover, data in this record shows that the incumbents do not have the capacity to transition even the existing UNE-P customer base to competitor-owned switching,[7] let alone perform hot cuts for new customers at commercial volumes or accommodate normal customer churn.[8]

Local Carrier Changes Should Be Processed at Parity with Interexchange Carrier Changes.

CompTel and the PACE Coalition urge the Commission to use the manner in which carrier changes are processed in the long distance market as the model for resolving the loop impairment caused by the ILECs' deficient manual process for migrating local customers. The primary interexchange carrier ("PIC") change process allows customers of any size or customer class to migrate seamlessly between long distance carriers, without jeopardizing the customer's dial-tone. This is because the process is fully automated. In fact, there is vibrant competition in the long distance market today because provisioning PIC changes is: (1) inexpensive, (2) reliable, (3) fast and (4) scaled to commercial volumes.

Indeed, the RBOCs have been some of the biggest beneficiaries of the superior PIC change process. For example, Verizon claims that it took less than seven months for its long distance affiliate to win its one millionth customer after receiving long distance authority in New York.[9] Similarly, SBC claims that as of July 2001, it had won 2.8 million long distance customers in Texas, Kansas and Oklahoma,[10] while BellSouth recently announced it had gained a 21 percent share of the "small business mass market" in the few short months since its long distance entry in Georgia and Louisiana.[11] In contrast, as of December 31, 2001, almost six years after the passage of the Telecom Act, *all* competitors, using all modes of entry, had captured only 3.4 million switched access lines in New York, 2.6 million switched access lines Texas, Kansas and Oklahoma, and

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7 The New York Public Service Commission estimates Verizon's hot cut performance must improve 4400 percent to move the existing UNE-P customer base to competitor-owned switches. Alternately, at Verizon's existing hot cut performance levels, it would take 11 years to move the 1.8 million UNE-P lines in New York to UNE-L. *Comments of the New York Public Service Commission*, CC Docket Nos. 98-147, 96-98, 98-147 (April 4, 2002). ("NYPSC comments"); *see also Z-Tel Comments*, Rubino Aff. (testifying that in New York, Verizon could only provide Z-Tel 4,000 hot-cuts per month to Z-Tel; at those levels and because of churn, Z-Tel would *never* be able to migrate its existing customer base in New York to a self-provided switch).

8 Thus far, the incumbents' high charges for hot cuts and poor performance has sufficiently repressed demand to mask the fact that hot-cut capacity is inherently constrained and would never accommodate commercial volumes comparable to UNE-P.

9 Verizon Press Release, August 1, 2001.

10 SBC Press Release, August 20, 2001.

11 BellSouth Reports Third Quarter Earnings, October 22, 2002.

0.69 million access lines in Georgia and Louisiana, respectively.[12] This is due in no small part to difficulty accessing these customers' last-mile facilities. Competitive carriers need a fully automated process, similar to the PIC change process, to have a meaningful opportunity to compete in the local market without reliance on unbundled local switching.[13]

Thus, before the Commission can even begin to consider whether to eliminate local switching as an unbundled network element, the Commission must ensure that competitors can access unbundled loops in a manner similar to the PIC change process. Although CompTel and the PACE Coalition support AT&T's Electronic Loop Provisioning proposal as one means to alleviate loop impairment, we do not believe that the Commission must condition the availability of switching on the deployment of a specific network architecture. Instead, CompTel and the PACE Coalition propose that the ILECs demonstrate that their loop provisioning *processes* comply with certain objectively verifiable criteria before the Commission can consider further restricting local switching as an unbundled network element.[14]

Price: Currently, pursuant to the Commission's rules, an interexchange carrier pays no more than $5 when a local exchange carrier processes a PIC change order. CompTel believes that this rate is not cost-based and has asked the Commission to require a reduction in this charge in a pending rulemaking.[15] In the BellSouth region where PIC change charges have been based on cost, the rate is $1.49. As a federal maximum, CompTel and the PACE Coalition recommend that the ILECs be required to implement processes where the non-recurring charge for provisioning a local loop should is no more than $5. In fact, the charge for loop provisioning should be in the range of $1 to $2, which is the TELRIC-based charge that many state commissions have required for UNE-P migrations.

Reliability: Loop migrations must be performed correctly and within the designated interval 95 percent of the time. This is because of the inherent risk of placing the customer out of service: end users should not be "punished" with the loss of service because they decide to switch to a competitive carrier. Most state commissions, in their own performance assurance plans, have established a benchmark of 95 percent for UNE-P migrations. A similar standard is appropriate

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12 *FCC Local Telephone Competition: Status as of December 31, 2001*. CompTel acknowledges that this data is somewhat stale and understates the market share gains of competitive carriers. Similarly, it is reasonable to believe that the RBOCs have also gained a substantial number of new interexchange customers.

13 Again, CompTel emphasizes that significant improvement to the ILECs' loop provisioning processes only is the first step toward enabling competitors to move from UNE-P to UNE-L.

14 States, of course, would remain free to render unbundling decisions consistent with the authority granted by their individual state laws.

15 *In the Matter of Presubscribed Interexchange Carrier Charges*, CC Docket No. 02-53.

for stand-alone loop migrations. CompTel suggests that the Commission define reliability objectively – in terms of minimizing the amount of time a customer loses dial-tone.

Time: PIC changes require a software change that takes approximately 15 minutes for the local exchange carrier to process. For parity reasons, CompTel believes that a loop should be provisioned within the same time frame. Nonetheless, CompTel and the PACE Coalition believe that as a starting point, the Commission should implement the same interval that most state commissions require for UNE-P migrations, which is 1 to 3 days.

Scalability: At a minimum, the ILECs must be able to perform local conversions at a level that reflects current UNE-P volumes in a state and an anticipated competitive churn level. CompTel and the PACE Coalition believe that this would require the ILECs to be able to convert 3 to 4 percent of their existing access lines in a state each and every month, taking into account, for performance purposes, the appropriate level of geographic disaggregation.[16]

Current ILEC Loop Provisioning Processes Do Not Meet These Criteria.

The ILECs must have the burden to demonstrate that they have a cost-effective, reliable, fast and, most importantly, scalable process for provisioning unbundled local loops. The RBOCs have not been able to demonstrate their compliance with these criteria to date. For example, in a recent *ex parte* submission, BellSouth heralds its loop provisioning performance; tellingly, BellSouth provides no data concerning the *volume* of hot cuts that it has or will be able to process.[17] SBC claims in a recent *ex parte* presentation that it processed more than 500,000 hot cuts across its 13 in-region states over a 12-month span.[18] In a subsequent filing, SBC states that as of Third Quarter 2002, it will have lost 4.2 million local customers to competitors providing service via UNE-P.[19] Based on SBC's own data, it would take *eight years* for SBC to transition the existing UNE-P customer base to unbundled loops if it performed hot cuts at existing volumes. Even accepting SBC's claim that it could perform approximately 1 million hot

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16 Z-Tel's Reply Comments, Ford Reply Decl., provides evidence that in competitive environment, mass market churn ranges from 5 to 9 percent per month. As a result, to support growth of CLEC market share and necessary churn, ILECs need to be able to turn-over a significant number of access lines per month – at scales far beyond current hot-cut volumes. For example, in New York, UNE-P volumes regularly exceed 200,000 conversions per month, while manual hot-cuts performed amount to only a few thousand per month.

17 *BellSouth Ex Parte Notification*, CC Docket No. 01-338 (filed Oct. 7, 2002).

18 *SBC Telecommunications, Inc., Memorandum of Ex Parte Presentation*, CC Docket Nos. 01-338, 96-98, and 98-147 at p. 7 (filed Oct. 11, 2002).

19 *SBC Telecommunications, Inc., Memorandum of Ex Parte Presentation*, CC Docket Nos. 01-338, 96-98, and 98-147 at p. 3 (filed Oct. 24, 2002).

cuts in a 12-month period in the Ameritech region[20] (and extending this performance across SBC's 13- state footprint), it would take SBC *four years* to transition these customers to competitor-owned switches.[21]

Similarly, when evaluating Verizon's hot cut performance in New York, the New York Public Service Commission ("NYPSC") determined that Verizon's hot cut performance would have to improve by *4400 percent* just to transition existing customers to competitor-owned switches.[22] Despite the existence of extensive carrier-to-carrier performance measures with penalties for poor loop provisioning performance, the NYPSC still required Verizon to provide virtually unrestricted access to unbundled local switching based on the material impairment that CLECs face when attempting to access unbundled local loops.[23] In short, wholesale performance measures have not and will not provide the ILECs with adequate incentive to provide a fast, inexpensive and reliable loop provisioning process at commercial volumes.

These capacity constraints and scalability issues have the effect of severely "gating" CLEC entry. Even taking SBC's "1 million lines in Ameritech region per year" statement at face value, that means that CLEC market share in that region would be capped at 5.5 percent. According to FCC data, the five Ameritech states currently have 30.4 million access lines.[24] Even if one assumes that CLECs would experience only 5 percent monthly churn, limiting CLECs to only 83,333 hot-cuts per month (or 1 million per year) would cap CLEC entry at 1.67 million lines, or only 5.5 percent of the market.

Limiting CLEC growth to only a small portion of the market is, of course, what we would expect the ILECs to want.

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20 *SBC Telecommunications, Inc., Memorandum of Ex Parte Presentation*, CC Docket Nos. 01-338, 96-98, and 98-147 at p. 12 (filed Oct. 11, 2002).

21 The Commission should also review SBC's data with skepticism because SBC does not indicate whether it performed these hot cuts in compliance with state-mandated performance levels, nor does SBC explain whether its hot cut numbers reflect the migration of physical loops, or whether these numbers instead define loops in terms of voice-grade equivalents, i.e., a DS1 loop equals 24 voice grade equivalents. If SBC uses the latter approach, it would significantly overstate the number of hot cuts that SBC performed, creating even greater concern about the scalability of its existing loop migration processes.

22 NYPSC comments at p. 4.

23 Unbundled local switching is required to be made available by Verizon on an unrestricted basis except in 17 central offices in the state. In those central offices, Verizon may limit the availability of local switching to customers with 18 lines or less. *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, Case 00-C-1945; *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case No 98-C-1357, p. 31, Issued and Effective February 27, 2002.

24 *FCC Local Telephone Competition: Status as of December 31, 2001* (Table 6).

The ILECs Must Demonstrate Adequate Loop Provisioning Performance Before the Commission Considers Restricting Access to Local Switching.

The Commission must therefore examine the ILECs' actual loop provisioning performance, with significant involvement from the state commissions, before it even begins to consider restrictions on the availability of unbundled local switching. This is because hot cuts are not performed at commercial volumes today.[25] As such, RBOC hot cut performance has not been volume tested in most, if not all, third-party operations support systems ("OSS") tests in the Section 271 context.[26] The Commission has no basis, other than blank promises from the RBOCs, that their existing loop provisioning processes are in fact scalable and can be performed at commercial volumes that will support meaningful mass market competition. This Commission has effectively required the RBOCs to retain a third-party testing agent to evaluate the incumbents' systems and processes before allowing them into the long distance market based on the belief that a promise of future performance is not sufficient to demonstrate actual compliance with the Telecom Act and the Commission's implementing rules. If the Commission abandons this requirement, it might be faced with circumstances similar to those in New York in the weeks after Verizon's Section 271 entry, although at a much greater magnitude.[27]

CompTel and the PACE Coalition believe that the record in this proceeding contains extensive support for the retention of unbundled local switching on a national basis. CompTel and the PACE Coalition urge the Commission to develop rules that require the ILECs to demonstrate compliance with the criteria listed above *before* the Commission even considers whether local switching could possibly be restricted. An

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[25] The following data, taken from the aggregate CLEC performance data compiled by BellSouth, SBC and Verizon, compares the volume of hot cuts vis-à-vis the provision of UNE-P lines. These statistics illustrate the de minimis number of hot cuts performed by the three major RBOCs today:

Georgia: May: Hot cuts (749) UNE-P (123,485); June: Hot Cuts (824) UNE-P (128,758); (no data for July)

New York: May: Hot cuts (2,946) UNE-P (166,023); June: Hot Cuts (3,411) UNE-P (167,906); July: Hot Cuts (1,992) UNE-P (177,302)

Texas: May: Hot Cuts (3,704) UNE-P (190,124); June: Hot Cuts (2,496) UNE-P (195,196); July: Hot Cuts (2,876) UNE-P (207,982)

[26] As recently as October 17, 2002, BearingPoint (formerly KPMG Consulting), the third party OSS test agent for the Ameritech region, testified before the Michigan Public Service Commission ("MPSC") that BearingPoint has not volume tested the provisioning of hot cuts or the migration of UNE-P lines to UNE-L. In fact, BearingPoint's witness in the MPSC's Section 271 investigation explained that they tested less than 200 hot cut orders and that BearingPoint has never tested volumes of hot cuts in any OSS test. *See In the matter to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996, Transcript from October 17, 2002 Session,* Case No. U-12320, at p. 5500, 5526.

[27] *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, Order Adopting Consent Decree,* File No. EB-00-IH-0085 (March 9, 2000).

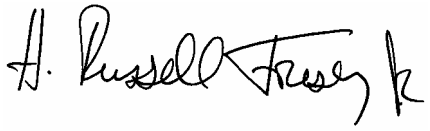
ILEC would be required to make a prima facie case demonstrating its compliance with these criteria to the relevant state commission. State fact-finding is critical because the hot cut process and costs are inherently local, as are the cost and market conditions that define boundaries of impairment. Thus, as the incumbents attempt to improve their loop provisioning processes, they might satisfy the stated metrics in different markets at different times. Moreover, a review of ILEC loop performance is fact-specific. States not only have the local experience and expertise necessary to make such determinations, they also routinely utilize the processes and procedures – including discovery, sworn testimony and cross-examination on the record – that are essential to reasoned fact-finding.

* * *

It is only through the elimination of well-documented entry barriers that the Commission will provide a means for competitive carriers to viably provide mass market service to consumers using non-incumbent switching facilities. CompTel and the PACE Coalition have explained, and the record supports, the formidable obstacles that have constrained competitors' ability to provide such services to date. The loop is the prototypical essential facility, and, not surprisingly, barriers to competitive switch deployment are inextricably linked to loop access. The ILECs, as the owners of the loop facilities, certainly possess the best knowledge of how to most quickly and efficiently eliminate these barriers to loop access. CompTel and the PACE Coalition have provided a test for determining when loop access impairment no longer exists. It is up to the Commission to now adopt rules, with implementation assistance from the state commissions, that will allow competitors to compete on equal footing with the incumbent carriers for the benefit of all consumers.

Accordingly, for the reasons stated above, CompTel and the PACE Coalition strongly encourage the Commission to adopt this proposal. Please contact the undersigned if you have any questions concerning this letter.

Sincerely,



H. Russell Frisby, Jr.
President
The Competitive Telecommunications Association

Genevieve Morelli
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cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
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